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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF MARYLAND, *et al.*,

Appellants,

v.

UNITED STATES OF AMERICA AND AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JOINT JURISDICTIONAL STATEMENT OF THE STATES OF MARYLAND, ARIZONA, DELAWARE, MISSOURI, NEW HAMPSHIRE, NORTH CAROLINA, TENNESSEE AND WISCONSIN, THE COMMONWEALTH OF VIRGINIA, THE PUBLIC SERVICE COMMISSIONS OF ALABAMA, KENTUCKY, TENNESSEE, WEST VIRGINIA AND WISCONSIN, THE PUBLIC UTILITIES COMMISSION OF SOUTH DAKOTA AND THE VIRGINIA STATE CORPORATION COMMISSION

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QUESTION PRESENTED

In framing injunctive relief under the Sherman Act, may a court direct persons to violate or disregard State law and State action that implement state policy to preserve adequate, economical and universal intrastate telephone service and that are placed outside the reach of the Sherman Act by the State Action Doctrine?

PARTIES TO THE PROCEEDING IN THE DISTRICT COURT

In addition to the United States, American Telephone and Telegraph Company ("AT&T"), Western Electric Company, Inc. and Bell Laboratories, Inc., the District Court made the following parties intervenors by Orders of August 26, 1982, and October 14, 1982, Joint Appendix to Jurisdictional Statements of Appellants ("J.A.") at 191-94, 201-03: Ad Hoc Telecommunications Users Committee; American Newspaper Publishers Association; American Petroleum Institute; American Satellite Company; Associated Telephone Answering Exchanges, Inc.; Association of American Railroads; Association of Data Communications Users; Association of Data Processing Service Organizations; Audichron Company; Black Citizens for a Fair Media; California Hispanics; Citizens Utilities Company; Communication Commission of the National Council of the Churches of Christ in the USA; Communications Workers of America; Compuserve, Inc.; Computer and Business Equipment Manufacturers Association; Computer and Communications Industry Association; Congress Watch; Continental Telecom, Inc.; D/FW Signal, Inc.; Education and Cultivation Division of the General Board of Global Ministries of the United Methodist Church; Federal Communications Commission; General Dynamics Communications Co.; General Telephone & Electronics Corp.; Independent Data Communications Manufacturers Association; Independent Telecommunications Suppliers' Council; International Telephone and Telegraph Corp.; Jack Faucett Associates, Inc., *et al.*; Leghorn Telepublishing Co.; MCI Com-

munications Corp.; Mobile Marine Radio, Inc.; National Association for the Advancement of Colored People; National Association for Better Broadcasting; National Association of Broadcasters; National Association of Regulatory Utility Commissioners; National Association of State Utility Consumer Advocates; National Cable Television Association; National Catholic Broadcasters Association; National Citizens Committee for Broadcasting; National Latino Media Coalition; National Newspaper Association; North American Telephone Association; Northeastern Telephone Co.; Office of Communication of the United Church of Christ; Reformed Church in America; Rogers Radio Communication Services, Inc.; Rural Telephone Coalition; San/Bar Corp.; Satellite Business Systems; Sonitrol Distributors Council, Inc.; Southern Pacific Communications Company; Sperry Corporation; Stromberg-Carlson Corp.; Tandy Corporation; Telocator Network of America; U.S. Telephone Communications, Inc.; United States Independent Telephone Association; United States Telecommunications Suppliers Association; United Telecommunications, Inc.; Utilities Telecommunications Council; Warner Amex Cable Communications, Inc.; Western Union Telegraph Co.; Westinghouse Broadcasting and Cable, Inc.; States of Arizona, California, Colorado, Delaware, Illinois, Maine, Maryland, Michigan, Missouri, New Hampshire, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Tennessee, Virginia, Wisconsin; Arkansas Public Utilities Commission; California Public Utilities Commission; District of Columbia Public Utilities Commission; Florida Public Utilities Commission; Idaho Public Utilities Commission; Kentucky Public Service Commission; Michigan Public Utilities Commission; Missouri Public Utilities Commission; Montana Public Utilities Commission; Nebraska Public Utilities Commission; Nevada Public Utilities Commission; New York Public Utilities Commission; South Dakota Public Utilities Commission; Utah Public Utilities Commission; Public Service Commission of West Virginia; Wisconsin Public Service Commission; Wyoming Public Utilities Commission; Iowa Commerce Commission; Kansas Corporation Commission; New Mexico Corporation Commission; Ohio Consumers Counsel; Oklahoma Corporation Commission; Virginia State Corporation Com-

mission; Washington Utilities & Transportation Commission; City of Cincinnati; City of New York; Telephone Equipment Corporation; Pittway Corporation; International Mobile Machines; Centel Corporation; Association of Long Distance Telephone Companies; Illinois Commerce Commission; Telecommunications Association; and Rochester Telephone Corporation.

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

The States of Maryland, Arizona, Delaware, Missouri, New Hampshire, North Carolina, Tennessee and Wisconsin, the Commonwealth of Virginia, the Public Service Commissions of Alabama, Kentucky, Tennessee, West Virginia and Wisconsin, the Public Utilities Commission of South Dakota and the Virginia State Corporation Commission ("State Appellants") respectfully request the Court to note probable jurisdiction of their appeal, pursuant to the Expediting Act, 88 Stat. 1709, 15 U.S.C. § 29(b), from the final judgment of the United States District Court for the District of Columbia, dated August 24, 1982.

OPINION BELOW

The Modification of Final Judgment from which State Appellants appeal was entered on August 24, 1982, and appears in the Joint Appendix to Jurisdictional Statements of Appellants ("J.A.") at 173-90. It has not been reported.

The opinion of the United States District Court for the District of Columbia discussing the legal issues presented in this appeal was entered on August 11, 1982. It has not yet been officially reported. It is unofficially reported in [Part II of Report 555] Trade Reg. Rep. (CCH) and is reprinted in the Joint Appendix at 1-172.

JURISDICTION

This Court has jurisdiction of this appeal from the modification of a consent order entered in a civil antitrust suit brought by the federal Government under section 2 of the Sherman Act pursuant to a certification under the Expediting Act, 88 Stat. 1709, 15 U.S.C. § 29(b), by the United States District Court for the District of Columbia that the interests of justice would be served by immediate appeal to this Court. (J.A. 204-208).

On November 20, 1974, the Department of Justice filed a civil antitrust action against AT&T, Western Electric Company, Inc. and Bell Telephone Laboratories, Inc. alleging violations of section 2 of the Sherman Act, 88 Stat. 1708, 15 U.S.C. § 2. *United States v. American Telephone and Telegraph Company*, Civil No. 74-1698 (D.D.C., filed November 20, 1974) (the "*AT&T*" case). The District Court had jurisdiction of that case pursuant to section 4 of the Sherman Act, 62 Stat. 909, 15 U.S.C. § 4, and pursuant to 62 Stat. 931, 28 U.S.C. § 1337.

On January 8, 1982, the Department of Justice and AT&T agreed to settle the *AT&T* case by entry of a voluntary dismissal. At the same time, they filed a stipulation with the United States District Court for the District of New Jersey consenting to the entry of a proposed Modification of a consent judgment in an earlier civil antitrust suit brought by the government against AT&T and its subsidiaries, *United States*

v. Western Electric Company, Civil Action No. 17-49 (D.N.J.) (the "*Western Electric*" case), and moved to transfer that action to the District Court in the District of Columbia. The *Western Electric* case was tranferred to the District of Columbia on January 21, 1982, and consolidated with the suit then pending before the District Court.

Before entering the proposed amendments to the *Western Electric* decree and dismissing the pending suit, the District Court held public comment proceedings — the equivalent of the procedures required by the Tunney Act, 94 Stat. 1157, 15 U.S.C. § 16 — to determine whether the proposed Modification was consistent with the public's interest. The State Appellants filed comments and briefs with the District Court as part of that process addressing, among others, the issues raised by this appeal.

On August 11, 1982, the court below filed an Opinion ruling on the comments submitted. The Opinion rejected State Appellants' argument. The court recommended certain changes to the proposed Modification not directly at issue in State Appellants' appeals. On August 19, 1982, a motion for reconsideration respecting one portion of the District Court's opinion was filed and, on August 23, 1982, it was denied. On August 24, 1982, the Modification, as amended pursuant to the court's recommendations, was entered.[1] On August 26, 1982, and October 14, 1982, the court entered orders admitting the State Appellants[2] and others as intervening parties. Among the rights conferred upon intervenors in that order was the right to appeal the entry of the Modification. (J.A. 193).

The State Appellants timely filed appeals from the entry of the Modification of Final Judgment with the District Court

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[1] Although the Modification requires the parties to formulate and submit the details of a plan of divestiture for District Court approval, it is a final judgment for purposes of appeal. *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962) (a decree resolving the issues outstanding between parties except for the formulation of a plan of divestiture constitutes a final judgment for purposes of an Expediting Act appeal).

[2] The District Court has not yet ruled on the application of the Tennessee Public Service Commission to intervene.

as required by Rules 3 and 4 of the Federal Rules of Appellate Procedure. The dates the State Appellants filed notices of appeal are: Arizona, November 5, 1982; Delaware, November 5, 1982; Maryland, October 25, 1982; Missouri, November 5, 1982; New Hampshire, November 5, 1982; North Carolina, November 5, 1982; Tennessee, October 25, 1982; Virginia, November 5, 1982; Wisconsin, November 5, 1982; Alabama Public Service Commission, November 4, 1982; Kentucky Public Service Commission, November 5, 1982; South Dakota Public Utilities Commission, November 4, 1982; Tennessee Public Service Commission, October 25, 1982; Virginia State Corporation Commission, October 25, 1982; Public Service Commission of West Virginia, November 5, 1982; Wisconsin Public Service Commission, October 29, 1982.

On November 5, 1982, the State of Maryland timely moved under the Expediting Act, 88 Stat. 1709, 15 U.S.C. § 29(b), for certification of this case for direct review by this Court.[3] On November 10, 1982, the District Court certified the appeals of the State Appellants and others[4] for direct review by this Court ruling that "such immediate consideration is of general public importance in the administration of justice." (J.A. 204-208).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The text of the following Constitutional and statutory provisions is set out in the Joint Appendix:

U.S. Const. art. I, § 8, cl. 2; art. VI, cl. 2. (J.A. 241).

15 U.S.C. §§ 2, 16, 29(b). (J.A. 242-47).

Alabama Public Service Commission Laws, Ala. Code §§ 37-1-31, 37-1-32, 37-1-40, 37-1-43, 37-1-50, 37-2-5, 37-2-171, 37-2-180 (1975 & Supp. 1981). (J.A. 248-51).

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[3] Similar motions were made by the United States, November 8, 1982; the State of Tennessee and the Tennessee Public Service Commission, November 9, 1982; and the Alabama Public Service Commission, November 9, 1982.

[4] The appeals of the State of Illinois, Tandy Corporation, North American Telephone Association and Jack Faucett Associates, Inc. were also certified.

Ariz Const. art. 15, §§ 2, 3, 4, 5, 6, 7, 9, 12, 13, 14, 15. (J.A. 252-55).

Arizona Corporation Commission Laws, Ariz. Rev. Stat. Ann. §§ 40-201, 40-202, 40-203, 40-204, 40-221, 40-241, 40-250, 40-251, 40-281, 40-284, 40-285, 40-286, 40-301, 40-302, 40-323, 40-328, 40-329, 40-361, 40-362, 40-367, 40-369 (1975 & Supp. 1981). (J.A. 255-69).

Delaware Public Service Commission Laws, Del. Code Ann. tit. 26, §§ 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 163, 164, 165, 166, 901, 902, 903, 904, 905, 906, 907 (1974 & Supp. 1982). (J.A. 270-82).

Kentucky Public Service Commission Laws, Ky. Rev. Stat. Ann. §§ 278-010, 278.020, 278.040, 278.160, 278.290, 278.300 (1969 & Supp. 1982). (J.A. 270-303).

Maryland Public Service Commission Law, Md. Ann. Code art. 78, §§ 1, 2(o), 3, 24, 27, 28, 56, 59A, 61, 62, 62A, 63, 65, 66, 67, 67E, 68, 69, 69B, 70, 73, 75, 99, 101, 104 (1980 & Supp. 1982). (J.A. 304-23).

Missouri Public Service Commission Law, Mo. Ann. Stat. §§ 386.250, 386.320, 392.200.3, 392.240, 392.250, 392.260, 392.270, 392.300, 392.320.2, 392.340 (Vernon 1952 & Supp. 1982). (J.A. 324-34).

New Hampshire Public Service Commission Laws, N.H. Rev. Stat. Ann. §§ 362:2, 369:1, 369:2, 369:3, 369:4, 369:7, 369:11, 369:12, 369:14, 369:15, 374:1, 374:3, 374:4, 374:5, 374:13, 374:22, 374:28, 374:30, 378:1, 378:3, 378:4, 378:5, 378:6, 378:7 (1966 & Supp. 1981). (J.A. 335-43).

North Carolina Public Utilities Act, N.C. Gen. Stat. §§ 62-2, 62-3, 62-12, 62-20, 62-23, 62-31, 62-32, 62-33, 62-34, 62-35, 62-36, 62-37, 62-38, 62-39, 62-40, 62-41, 62-42, 62-43, 62-44, 62-45, 62-47, 62-48, 62-49, 62-51, 62-60, 62-60.1, 62-61, 62-62, 62-63, 62-64, 62-65, 62-66, 62-67, 62-68, 62-69, 62-70, 62-71, 62-73, 62-76, 62-77, 62-80, 62-90, 62-95, 62-96, 62-110, 62-111, 62-112, 62-113, 62-116, 62-118, 62-119, 62-120, 62-121, 62-122, 62-123, 62-124, 62-130, 62-131,

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South Dakota Public Utilities Commission Laws, S.D. Comp. Laws Ann. §§ 49-1-8, 49-3-1, 49-3-3, 49-3-4, 49-3-10, 49-3-11, 49-8-2, 49-10-1, 49-30-1, 49-31-1, 49-31-2, 49-31-3, 49-31-6, 49-31-7, 49-31-15 (1967 & Supp. 1980). (J.A. 405-09).

Tennessee Public Service Commission Laws, Tenn. Code Ann. §§ 65-4-101, 65-4-104, 65-4-105, 65-4-106, 65-4-107, 65-4-110, 65-4-111, 65-4-112, 65-4-113, 65-4-114, 65-4-115, 65-4-201, 65-4-202, 65-4-203 (1980). (J.A. 410-18).

Va. Const. art. IX, § 2. (J.A. 419).

Virginia State Corporation Commission Laws, Va. Code §§ 56-35, 56-56, 56-57, 56-58, 56-67, 56-77, 56-80, 56-265.2, 56-265.3, 56-265.4 (1981 & Supp. 1982). (J.A. 410-23).

West Virginia Public Service Commission Laws, W. Va. Code §§ 24-1-1, 24-1-2, 24-2-1, 24-2-1a, 24-2-2, 24-2-3, 24-2-6, 24-2-7, 24-2-11, 24-2-12, 24-3-1, 24-3-7 (1980 & Supp. 1982). (J.A. 424-39).

Wisconsin Public Service Commission Laws, Wis. Stat. Ann. §§ 184.06, 196.01, 196.02, 196.04, 196.05, 196.09, 196.37, 196.375, 196.38, 196.49, 196.50, 196.52, 196.605, 196.79, 196.80, 196.81 (West 1957 and Supp. 1982). (J.A. 440-69).

STATEMENT OF THE CASE

On January 8, 1982, the United States and AT&T announced the settlement of their legal dispute, which had been in trial for more than a year, *United States v. American Telephone and Telegraph Co.*, Civil Action No. 74-1698 (D.D.C.). The settlement was effected by an agreed dismissal of the *AT&T* case and the submission of a proposed Modification of Final Judgment to replace a consent decree entered in 1956 in *United States v. Western Electric Company, Inc. and Amer-*

ican Telephone and Telegraph Company, Inc., Civil No. 17-49 (D.N.J.). On January 14, 1982, the *Western Electric* case was transferred to the United States District Court for the District of Columbia and assigned to District Judge Harold Greene, who presided over the trial in the *AT&T* case.

The Modification requires AT&T to divest itself of its local telephone companies (referred to as "Bell Operating Companies" or "BOCs"). Although the details of the plan of divestiture have not been finalized, it is clear from the Modification that many of the steps in the contemplated divestiture require the BOCs, all of which are subject to regulation by State public service commissions ("PSCs"), to take actions that are subject to PSC jurisdiction without first obtaining PSC approval or, in some cases, that require the BOCs to violate State law. Specifically, the Modification requires that AT&T take charge of the assets of the BOCs and then transfer to new local telephone companies assets sufficient for them to perform, independently of AT&T, "exchange telecommunications and exchange access functions." Modification ¶ I A(1). (J.A. 174). These transfers are to be effected by the parties without any requirements that PSCs even be consulted, notwithstanding State law that requires PSC *approval*.[5]

The Modification also requires the BOCs to cease performing various services which are currently subject to PSC regulation, such as intrastate interexchange service. Again, the Modification simply ignores State PSC jurisdiction, despite the fact that State law *requires* PSC approval before a regulated utility discontinues any service.[6] Moreover, the

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[5] Ala. Code § 37-1-50 (1975); Ariz. Rev. Stat. Ann. §§ 40-285, 40-367 (1975); Del. Code Ann. tit. 26, § 165 (1974); Ky. Rev. Stat. Ann. §§ 278.010, 278.040, 278.290 (1969) (*See Public Service Commission v. Cities of Southgate, etc., Ky.*, 268 S.W.2d 19 (Ky. 1954)); Md. Ann. Code art. 78, § 24 (1980); Mo. Ann. Stat. § 392.300 (Vernon 1952); N.H. Rev. Stat. Ann. § 374:30 (1966); N.C. Gen. Stat. § 62-111 (1978); S.D. Comp. Laws § 49-31-3 (1980); Tenn. Code Ann. § 65-4-112 (1980); Va. Code §§ 56-35, 56-56, 56-77, 56-80 (1981); W. Va. Code § 24-2-12 (1980); Wis. Stat. Ann. §§ 196.01, 196.81 (1982).

[6] Ala. Code § 37-1-50 (1975); Ariz. Rev. Stat. Ann. §§ 40-281, 40-285, 40-329, 40-361 (1975); Del. Code Ann. tit. 26, § 165 (1974); Ky. Rev. Stat.

Modification requires the new local telephone companies to restrict their future business activities by denying them the right to "provide any other product or service between intrastate exchange areas to be approved by the court [called "Local Access Transport Areas" or "LATAs"], except exchange telecommunications and exchange access service, that is not a natural monopoly service actually regulated by tariff." Modification ¶ II D(3). (J.A. 176). Finally, the Modification purports to authorize "competitive" firms to provide *intrastate* interexchange service, notwithstanding the judgment of State legislatures that PSCs may require regulated companies to provide these services.[7] In sum, the Modification disregards State law directing PSCs to regulate utilities to assure consumers adequate, economic, and universal public telephone service.[8]

Prior to acceptance of the Modification, the District Court permitted all interested persons to submit comments discussing whether the Modification was in the public interest. Following the initial round of comments, the court invited more detailed briefs from the public addressing particular issues, including the impact of this Modification on State regulation. In written submissions to the court on April 20, 1982, and June 14, 1982, and in oral argument before the court on June 29, 1982, the State Appellants argued that the

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Ann. §§ 278.010, 278.040 (1969) (*See Public Service Commission v. Cities of Southgate, etc., Ky.*, 268 S.W.2d 19 (Ky. 1954)); Md. Ann. Code art. 78, §§ 24, 75 (1980); Mo. Ann. Stat. § 392.300 (Vernon 1952); N. H. Rev. Stat. Ann. §§ 374:28, 374:30 (1966); N.C. Gen. Stat. § 62-118 (1978); S.D. Comp. Laws Ann. §§ 49-3-10, 49-31-3 (1980); Tenn. Code Ann. § 65-4-112 (1980); Va. Code § 56-35 (1981) (*See Virginia Electric & Power Co. v. State Corporation Commission*, 219 Va. 894, 252 S.E.2d 333 (1979)); W. Va. Code §§ 24-3-1, 24-3-7 (1980); Wis. Stat. Ann. §196.81 (1982).

[7] Ariz. Rev. Stat. Ann. §§ 40-329, 40-361 (1975); Del. Code Ann. tit. 26, §§ 131, 132, 135, 136 (1974); Ky. Rev. Stat. Ann. §§ 278.010, 278.040 (1969); Md. Ann. Code art. 78, §§ 28(c), 59A, 73 (1980); Mo. Ann. Stat. §§ 392.240, 392.250 (Vernon 1952 & Supp. 1982); N.H. Rev. Stat. Ann. § 374:1 (1966); N.C. Gen. Stat. §§ 62-42, 62-113, 62-138 (1978); S.D. Comp. Laws Ann. §§ 49-3-10, 49-31-7, 49-31-15 (1980); Tenn. Code Ann. §§ 65-4-113, 65-4-114 (1980); Va. Code § 56-265.4 (1981); W. Va. Code §§ 24-2-1, 24-2-2 (1980); Wis. Stat. Ann. § 196.04 (1957).

[8] *See, e.g.*, N.C. Gen. Stat. § 62-2 (1978); W. Va. Code § 24-1-1 (1980).

Modification impermissibly seeks to supersede State public utility laws not preempted by virtue of the State Action Doctrine. *Parker v. Brown*, 317 U.S. 341 (1943).

On August 11, 1982, the court issued an opinion which, in dealing with the State Action issue raised in the comment period, rejected this argument. (J.A. 42-47). The court held that the protection afforded State regulation by the State Action Doctrine does not apply where "there is a conflict between a necessary antitrust remedy in a case where the federal antitrust court has jurisdiction and in which the antitrust laws have been validly applied as a substantive matter and state regulatory schemes which would prevent such a remedy from being implemented." (J.A. 46). In so holding, the District Court found that the State Action Doctrine is applicable only in cases of conflict between explicit state statutory policy and "inchoate, general antitrust policy." (J.A. 46).

THE QUESTION IS SUBSTANTIAL

The question of whether a federal court, acting pursuant to jurisdiction conferred by the Sherman Act, may enter a decree that commands parties to ignore or violate valid State law is indeed substantial. At issue is the manner in which telecommunications services are to be provided to a tremendous portion of the American population and the ability of State public service commissions to act, in a manner chosen by their State legislatures, to ensure that their citizens are provided adequate, economic and universal telephone service.

This case also presents important questions of State-Federal relationships that go beyond the boundaries of this suit. The holding of the District Court, which permits a federal court acting under the Sherman Act to require persons to take actions that contravene expressly articulated State law, establishes a precedent that derogates the ability of States to regulate business activity generally. At issue in this case is whether the antitrust enforcement policy of the federal government may, in the name of enhancing competition,

compromise the traditional regulatory role performed by States by preempting State regulation in spite of the protection the Sherman Act affords such regulation.

The Modification approved by the Court below effectively preempts State law to accommodate a remedy desired by the Department of Justice and AT&T. In so doing, the consent decree in this case purports to extend the reach of the Sherman Act far beyond that which Congress intended. In enacting the Sherman Act, Congress preserved the ability of States to regulate economic activity, even where competition may be impaired. *Parker v. Brown*, 317 U.S. 341 (1943). Thus, Congress did not exercise its broad Commerce Clause powers fully, choosing instead to prohibit only restraints of trade by private persons "and not to prohibit a State from imposing a restraint as an act of government." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788 (1975).

In *Parker v. Brown*, 317 U.S. 341 (1943), this Court held that a California statute authorizing a State agency to regulate and set rates for that State's raisin industry did not conflict with federal antitrust law. The California regulatory program was immune from the operation of the Sherman Act because Congress did not intend that Act's strictures to apply to State actions:

> [California's regulatory program] derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.
>
> The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.

* * * * *

> There is no suggestion of a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only "business combinations".

317 U.S. at 350-351. The Court concluded that in light of its "words and history, it [the Sherman Act] must be taken to be a prohibition of individual and not state action." 317 U.S. at 352.

Recent decisions of this Court have affirmed the vitality of the State Action Doctrine articulated in *Parker*. *See Community Communications Co. v. City of Boulder*, 102 S.Ct. 835 (1982); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976). In *Midcal Aluminum*, this Court summarized the test for determining when the State Action Doctrine is applicable: first, the State policy requiring regulation must be "clearly articulated and affirmatively expressed" and second, the State must "actively" supervise the regulated activity.[9] 445 U.S. at 105. When these criteria are met, the State regulation is "outside the reach of the antitrust laws under the 'state action' exemption." *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. at 109.

Supplanting competition with regulation is the basic concept underlying the existence of State public service commissions. Indeed, State public service commission laws are archetypical examples of clear State policy decisions to supplant competition with active State regulation. These laws are the result of State legislative recognition that public utility service cannot be provided adequately or economically in a competitive market. They have been adopted to protect the public from monopoly abuse, and they assure universal access to vital utility services.

In recognition of the importance of effective regulation of

[9] The scope of the State Action exemption as it applies to any particular State regulatory scheme can be determined only after careful examination of the command of that State's legislature. *See, e.g., Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976).

utility service, States have vested their public service commissions with plenary regulatory powers. For example, Maryland's Public Service Commission is charged with the duty to supervise and regulate all public service companies[10] "to assure their operation in the interest of the public and to promote adequate, economical, and efficient delivery of utility services in the State . . . ." Md. Ann. Code art. 78, § 56 (1980). To this end, the Maryland General Assembly has vested the Commission with the strongest mandate possible:

> The jurisdiction and powers of the Public Service Commission shall extend to all public service companies . . . engaged in or operating a utility business in this State . . . to the full extent permitted by the Constitution and laws of the United States. The powers of the Commission shall be liberally construed; and the Commission shall have the powers specifically conferred by this article and by any other law, and also all implied and incidental powers necessary and proper to carry out effectually the provisions of this article.

Md. Ann. Code art. 78, § 1 (1980).

Public service companies must seek authorization from the Public Service Commission prior to transferring, abandoning or discontinuing any public service. Md. Ann. Code art. 78, § 24 (b)(1), (3) (1980). The Commission is empowered to prescribe standards of "safe, adequate, reasonable and proper service" for any regulated company and is further empowered to enforce those standards. Md. Ann. Code art. 78, § 73 (1980). Moreover, the Commission may require regulated companies to submit plans for provision of future services and is empowered to order any revisions to those plans to effectuate its mandate. Md. Ann. Code art. 78, § 59A (1980). Finally, the Commission is empowered to determine just and reasonable rates which may be charged by public service companies for the services they are authorized to provide. Md. Ann. Code art. 78, § 68 (1980).

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[10] Telephone companies are included in the definition of "public service companies." Md. Ann. Code. art. 78, § 2(o).

Through statutory and Constitutional provisions similar to, or in many cases more specific than, those of the Maryland Public Service Commission Law, other states have affirmatively articulated their intention to regulate public utilities with specific commands.[11] For example, with regard to asset transfers, West Virginia's Public Service Commission statute states in very clear terms, "Unless the consent and approval of the public service commission of West Virginia is first obtained . . . no public utility subject to the provisions of this chapter [which includes telephone companies] . . . may assign, transfer, lease, sell or otherwise dispose of its franchises, licenses, permits, plants, equipment, business or other property or any part thereof . . . ." W. Va. Code § 24-2-12(c) (1980). Similarly, North Carolina's PSC statute clearly empowers that State's commission to require regulated companies to provide any services it deems necessary to serve the public's convenience and necessity, to remedy inadequate service or to improve facilities. N.C. Gen. Stat. § 62-42 (1978).

These statutes satisfy the State Action test. The State Appellants' public service commission laws clearly articulate state policies to replace competition with State regulation, and the State PSCs actively supervise public utility companies. Consequently, State public service commission laws are beyond the jurisdiction of the Sherman Act. *Orrin W. Fox Co.*, 439 U.S. at 109. The entry of the Modification by the District Court on August 24, 1982, therefore, raises the very important question of whether a Sherman Act decree may disregard these valid state PSC laws.

The implications of this case for State public utility regulation are profound. The restructuring of the BOCs required by the plan of divestiture will fundamentally impair State regulation of local telephone companies. Essential to the control of local telephone rates is the power of State PSCs to control the transfer of assets by regulated telephone companies and to determine the types of telephone service they provide. Without these controls, PSC authority to set rates is severely compromised. Yet, the modification usurps

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[11] See footnotes 5, 6, and 7 *supra*.

State control over both transfers of assets and determination of services. After divestiture, a new provider of local telephone service may not be sufficiently secure financially to assure economic service, possess sufficient assets to provide quality universal service, or be able to provide that range of services necessary to ensure consumers proper telephone service.

The Modification will result in judicial involvement in intrastate telephone regulation for many years to come. Under its terms, exchange areas, called LATAs (Local Access Transport Areas) must be established. Modification ¶ IV G (J.A. at 178-79). Each LATA boundary determines the area of operation for State-regulated local telephone companies. The Modification requires that the LATA boundaries be drawn according to demographic and political lines. As demographic patterns change, new boundaries will be required. The Modification contemplates District Court approval of any such changes. Consequently, the court below will be engaged in intrastate telephone regulation far into the future.

The implications of the rule established by the District Court extend beyond the borders of this case. Under the aegis of the Sherman Act, the entire body of State law regulating trade is subject to preemption by affirmative injunction imposed by federal consent decree. If entered in a private case, not even the right to object afforded by the Tunney Act would have to be given the State whose laws were effectively being repealed. Congress clearly did not intend that the Sherman Act would be used by federal courts to preempt State regulatory policies.[12] As this Court explained in *Parker*, "an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S. at 351. Yet, that is precisely what the rule in this case would do.

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[12] *United States v. Terminal Railroad Ass'n*, 236 U.S. 194 (1915). This Court would not permit a court acting with Sherman Act jurisdiction to correct an abuse of one statute by directing violation of another. *United States v. National Lead Co.*, 332 U.S. 319, 334-35 (1947) (court is under an obligation to accommodate valid laws in framing a decree).

CONCLUSION

For the above reasons, the Court should note probable jurisdiction of this appeal.

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